No. 2840

United States

Circuit Court of Appeals

For the Ninth Circuit.

MARY N. LUCAS,

Plaintiff in Error,

vs.

WALTER W. SCOTT, a Minor, JANET M. SCOTT, a Minor, RUBENA F. SCOTT, a Minor, and the BISHOP TRUST COMPANY, LIMITED, a Corporation, Guardian of the Estate of said WALTER W. SCOTT, JANET M. SCOTT and RUBENA F. SCOTT, Minors,

Defendants in Error.

REPLY BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

In the United States Circuit Court of Appeals for the Ninth Circuit.

MARY N. LUCAS,

Plaintiff in Error,

vs.

WALTER W. SCOTT, a Minor, Janet M. Scott, a Minor, Rubena F. Scott, a Minor, and the BISHOP TRUST COMPANY, LIMITED, a Corporation, Guardian of the Estate of Said Walter W. Scott, Janet M. Scott, and Rubena F. Scott, Minors,

Defendants in Error.

SUBMISSION OF CASE ON AGREED FACTS.

ON WRIT OF ERROR TO THE SUPREME COURT OF HAWAII.

Reply Brief on Behalf of Plaintiff in Error.

I.

WORDS OF SURVIVORSHIP—MEANING—CATHERINE NOT A SURVIVING DAUGHTER.

Our contention that by the proviso in Article "Third" of the Will relating to payment by the sons to the daughters or "surviving daughters" the testator meant daughters surviving at the expiration of the 25-year lease and did not mean daughters surviving at his own death, remains, upon its merits, wholly unanswered in the brief of the defendants in error. Not a word of argument is there advanced against the soundness of the construction thus contended for by us. Not because it remains unan-

swered on its merits, but because it is intrinsically sound it is respectfully submitted that the construction contended for by us should be adopted by this Court, and that it should be held that "surviving daughters" are those only who survived the expiration of the lease, and that Catherine was not a "surviving daughter."

II.

IN THE KAHILINA DECISION THE WORDS "SURVIVING DAUGHTERS" WERE NOT CONSTRUED; NO QUESTION OF SUPPOSED IMPOSSIBILITY OF PERFORMANCE WAS DETERMINED; WHAT WERE THE REQUIREMENTS OF THE PROVISO OR CONDITION WAS NOT DECIDED.

The only answer attempted by the defendants in error to our contention referred to in paragraph I above is summarized in their words (pp. 32, 33, of their brief) that "the question of survivorship does not and cannot enter into the case at this stage thereof. The Kahilina case settled that once and for all time." In various forms throughout their brief this claim is repeated.

One sufficient reply to this point of defendants in error is that the Kahilina decision did not decide, or attempt or purport to decide directly or indirectly, what the term "surviving daughters" means, or whether, in other words, "surviving daughters" are, on the one hand, those who survived the testator or, on the other hand, those who survived the expiration of the lease. A careful examination of the ma-

jority opinion in that case (set forth at length in brief of defendants in error, pages 40 to 50) will show this assertion to be correct; and in the minority opinion (opposing brief, p. 60—14 Haw. 391) the dissenting justice said, at the very time when the matter was under discussion by the court (dissenting opinions are, in Hawaii at least, always examined by the majority before the opinion of the latter is signed and filed), "as I understand the majority opinion, it is not therein decided, whether or not the condition named in the third clause requires the payment by the surviving sons of $5,000 to the heirs of any deceased son or daughter in order to defeat what is adjudged to be the vested interest of each son and daughter." This latter statement was not disputed in the majority opinion. An examination of both opinions in the Kahilina case will show that the question of the meaning of the words of survivorship, i. e., the question whether the sons were required to pay $5,000 to the heirs of a daughter who did not survive the expiration of the lease, was not before the Court for consideration. It was not in fact considered, either elaborately or scantily. Not a word of discussion on the subject is to be found in the Kahilina decision—not a word as to the existence or possibility of such a question or as to its effect upon the nature or extent of the title of the testator's children or any of them. How, under these circumstances, can it be held or even urged that the Kahilina case decides the question of survivorship or of the terms of the so-called condition of defeasibility and that that question is not open

for examination in this case? There is absolutely no foundation for such a claim, it is respectfully submitted.

The Kahilina case arose by submission on agreed facts. As stated in the submission, the claim of the sons Frank and Henry (brief of defendants in error, pp. 53 and 54) was that they then (1902) "owned two undivided thirds in fee simple of said estate under said will," and, inferentially, that the third son owned the other one-third, and the claim of the daughters was that each of the sons and daughters owned one-ninth in fee simple (subject to the widow's dower). No other claims were advanced by anyone. At that time (1902) all of the daughters had survived the testator and none of them had as yet failed to survive the expiration of the lease. There were as yet no heirs of any deceased daughter, for there was no deceased daughter; there was as yet no dispute, and no reason for dispute, as to whether a daughter who failed to survive the expiration of the lease would be a surviving daughter, or as to whether the heirs of such a nonsurviving daughter would be entitled to receive $5,000 from the sons or as to whether the sons, under those circumstances, had the right to pay such heirs $5,000 and thus defeat their interests, if any. Such an issue at that time (1902) would have been a fictitious issue, a moot question, and the Court, if it had been asked, would have refused to give it consideration.

The majority opinion in the Kahilina case did hold that each daughter had a vested estate, but it also held that that vested estate was defeasible by

the sons upon performance of the condition named in Art. III of the will, and it did not decide what the terms of that condition were. Its ruling was that "the children have equal vested estates in fee, subject to the widow's interest, defeasible as to the interests of the daughters and shortcoming sons upon the performance of *the prescribed conditions* by the other son or sons, the sons having meanwhile contingent executory devises as to such interests" (concluding paragraph of opinion, 14 Haw. 384, 385; defendants' brief, p. 50), and as expressed in the last paragraph of the syllabus prepared by the court itself (14 Haw. 379, defendants' brief, p. 42), "the children took * * * present vested estates in fee, defeasible as to the interests of the daughters and shortcoming son or sons upon the performance of *the prescribed conditions* by the other son or sons, the sons meanwhile having contingent devises as to such interests." But nowhere in that opinion did the court consider or determine what those "prescribed conditions" were. It was unnecessary to do so. The Court was not asked to do so and did not volunteer a decision upon a hypothetical state of facts (the failure of a daughter to survive expiration of the lease) which had not then arisen and might never arise. It is impossible to ascertain upon a study of the Kahilina decision what the view of the court was as to the meaning of the term "surviving daughters" or on the subject of alleged impossibility of performance.

Even if, therefore, this Court should, against our contention, take the view that the Kahilina decision

must be followed on the ground that it is binding or should be followed on the ground that it is correct, the decision so adopted would only be to the effect that the estate devised to the daughters was a vested estate, defeasible upon performance by the sons or one or more of them of "the prescribed condition," and it would still remain for this Court to consider and determine what the prescribed condition was and whether there is any impossibility of performance.

III.

THE KAHILINA DECISION IS NOT *RES JUDICATA* IN THIS CASE; NOR DOES THE DOCTRINE OF *STARE DECISIS* OR THAT OF "THE LAW OF THE CASE" APPLY IN ITS FAVOR.

Our argument in support of this contention is to be found at pages 17–22 of our opening brief. By anticipation it answered many of the contentions of the defendants in error advanced in an effort to rest their present case purely upon that decision. A few words will be here added.

The decision of the Supreme Court of the United States in *John Ii Estate* v. *Brown,* 235 U. S. 342, 59 L. E. 259, cited by defendants in error at page 25 of their brief, is not an authority in support of the view that the Kahilina decision must be followed by this Court. As appears largely from the very quotations given in the brief (pages 25 to 28), and more fully from an examination of the report of the case itself, one of the points in *Ii* v. *Brown* was the construction of a will written in the Hawaiian language and con-

strued many years ago, by judges presumably more or less familiar with the Hawaiian language, in Hawaii where evidence and information as to the meaning of the words was readily obtainable. It is not to be wondered at that with the Hawaiian court's decision of such a point the appellate court hesitated to interfere. The other points related to Hawaiian statutes and to the procedure of the courts of Hawaii. One of them, for example, was whether a bill in equity for the construction of a will could go from a circuit court in Honolulu to the Supreme Court of Hawaii by the method of "reserved questions," and whether upon an appeal by that method the Supreme Court of Hawaii had or could obtain jurisdiction. Another was whether a final, formal judgment had been entered. Still another was whether a bill in equity had been sufficiently signed by or on behalf of certain minors. And the other questions likewise were purely of local procedure. As the Supreme Court of the United States itself said in concluding its decision "the grounds for the supposed invalidity" of the decision appealed from "are matters mainly of form and local procedure, and wholly of local control." Not of that nature are the questions in the case at bar. The question now before this Court is solely one of the construction of a will, written in the English language, with which the judges of this court are not less familiar than are the judges of Hawaii. No Hawaiian statutes are involved. No Hawaiian customs are involved. No procedure of Hawaiian courts is involved. No matters of form and no matters of local control are involved. The

only question which is involved is the clear-cut question of construction upon which this court is fully competent to pass. The Act of Congress of January 28, 1915 (38 Stat. at L. 804, c. 22), which gives us the right of appeal to this court, gives us the right to the independent judgment of this court upon the issue. The Act of Congress necessarily proceeds upon the assumption that the Supreme Court of Hawaii is human and may err in its decisions, and that it is wise and just that litigants, in the cases mentioned in the Act, should have an opportunity to obtain from the judges of this court consideration of cases appealed and a statement of their own views upon the issues involved.

Nor does the fact that the Kahilina decision was rendered in 1902, at a time when appeals were allowed from the Supreme Court of Hawaii to the Supreme Court of the United States, only when federal questions were involved, in any wise abridge our present right of appeal. The present case and the Kahilina case are separate and distinct causes. Unless the doctrine of *res judicata* or that of *stare decisis* applies—and we submit that neither does apply —we are, under the present law, entitled to a complete review of all the law questions involved.

References have been made by the defendants in error to the Kahilina decision, as "the law of the case." If by that is meant anything different from the doctrine of *stare decisis* or that of *res judicata,* the contention is, it is submitted, unfounded. The doctrine of "the law of the case," much controverted and of doubtful soundness as it is, has no place ex-

cept in the discussion of the effect of a decision rendered on a *prior appeal in the same cause.*

On the subject of the claim of *res judicata,* the dedefendants in error refer to the fact that it is not stipulated in the submission that Catherine, Beatrice and Christian were not parties in the Kahilina case. The fact, however, does appear clearly on the face of the decision in the Kahilina case, reported in 14 Haw. 378.

One reason why the Kahilina decision is not *res judicata* in the case at bar is that the daughter Beatrice and the son Christian, each a grantor of ours, were not parties to that case and were not bound by the judgment therein and therefore we are not bound. Another reason is that Catherine, the predecessor in interest of the defendants in error, was not a party and was not bound by that judgment. There was never any issue in that case between any of the sons or any of the daughters, on the one hand, and Catherine on the other hand, for Catherine was not a party. An estoppel by judgment to be good must be mutual. "The judgment or decree must conclude both parties or it will conclude neither. The estoppel must be mutual. No person can take advantage of a judgment or decree if he would not have been prejudiced by it if it had been otherwise. A person who was not a party to an action cannot, by accepting the result of the judgment therein, make such judgment *res judicata* in his favor and preclude the parties to the action from objecting that the judgment was not binding upon him." 24 A. & E. Ency. Law, 730, 731.

23 Cyc. 1238, 1206, 1207.
1 Van Fleet, Former Adj., sec. 22, pp. 110, 111.
Bigelow, Estoppel (6th ed.), 127, 364, 553.
2 Black, Judgments (2 ed.), sec. 548.
1 Freeman, Judgments (4th ed.), sec. 159.
Litchfield v. *Crane,* 123 U. S. 549, 552 31 L. Ed. 199, 202.
Lane v. *Welds*, 99 Fed. 286, 288.

Catherine was not bound and her heirs cannot rightly claim any estoppel against us. Had the Kahilina decision been in our favor, we could not have rightly claimed an estoppel against Catherine or her heirs.

The Kahilina case was not a proceeding *in rem.* It was an ordinary proceeding between adversary parties, the only difference between it and an action of ejectment or other action to quiet title being that in the Kahilina case the parties agreed upon the facts instead of litigating them. There was no attempt to make the whole world parties by service by publication or otherwise. Only the testator's children therein named as parties were parties.

IV.

NO ABANDONMENT BY PLAINTIFF IN ERROR OF CONTENTION THAT THE DEVISE TO THE DAUGHTERS WAS OF A CONTINGENT AND NOT OF A VESTED ESTATE.

Defendants in error in their brief (page 30) say that "the plaintiff in error, under the next heading of her argument (plaintiff's brief, pages 31–32) abandons all distinctions as to kind or character of

estates as immaterial." No such abandonment was intended by us and none, it is submitted, can be inferred from our position in our opening brief. We did claim, and do claim, that in determining what the words of survivorship in Article III mean, it is immaterial whether the estate devised to the daughters was vested or contingent, because, as we contend, the meaning attached by the testator to the language used by him, in the proviso or condition in Article III, must have been one and the same, whether the court now regards the estate as vested or contingent and whether the court now regards the condition as subsequent or precedent. But we also claim and can, we submit, properly claim, that, if the question appears to the court to be material, the devise to the daughters was of a contingent remainder or executory devise, upon a condition precedent, and not of a vested remainder upon a condition subsequent.

V.

ASSIGNABILITY OF REMAINDERS, WHETHER VESTED OR CONTINGENT, AND OF EXECUTORY DEVISES BY WAY OF CONTINGENT REMAINDERS.

Not a word is said in the brief of our opponents by way of disputing the correctness of our contentions on this subject. It is submitted, both upon reason and upon authority, that the law contended for by us is too clear to admit of doubt.

VI.

THE SO-CALLED CONDITION SUBSEQUENT HAS NOT BECOME IMPOSSIBLE OF PERFORMANCE. EVEN IF CATHER-

INE'S CHILDREN NOW OWN A ONE-NINTH INTEREST, PLAINTIFF IN ERROR IS ENTITLED TO PAY THEM $5,000 AND THUS DEFEAT THEIR INTEREST AND HERSELF BECOME THE "UNDISPUTABLE" OWNER OF ALL THE LANDS MENTIONED IN ARTICLE III.

It is said in the brief of the defendants in error (point VI, pp. 38, 39) that "the testator did not intend that strangers should have the benefit of the privilege which he intended for his sons personally," and that "the privilege given to the sons was a purely personal privilege which is not assignable." It is submitted, however, that an examination of those passages will show that they constitute nothing more than a mere statement of a conclusion contended for, and that nothing is there advanced by way of argument in support of that contention. We rest on this point upon our argument set forth in our opening brief.

It is worthy of note that while the bare contention is advanced on behalf of defendants in error, that the proviso or condition mentioned in Article Third is now impossible of performance by reason of Catherine's death prior to the expiration of the lease and that the sons' right to pay $5,000 is not assignable, counsel doubtless deeming it his duty to his minor clients to call attention to every possible contention, the attorney for the defendants in error, without intending to abandon his contention, frankly discloses his own belief that the interest of the defendants in error is now defeasible by the plaintiff in error. His

own words (brief, p. 35) are: "The argument of defendants in error as to 'impossibility of performance' is contained below. Subject to that and the question of assignability of the option given the sons under clause 'Third' of the will, defendants in error believe that the statement by the plaintiff in error is correct, that the interest of the defendants in error may be defeated by the payment to them of $5,000 by the plaintiff in error"; and it is further worthy of note that while contending that the majority opinion appealed from (which holds the condition or proviso to be impossible of performance) should be affirmed, also contends, in the alternative, that the opinion of the Chief Justice (which rules against the claim of impossibility of performance and holds the interest of the defendants in error to be defeasible), should be affirmed (brief, pp. 35 and 40).

VII.

CONCLUSION.

The arguments of the plaintiff in error upon the two main points involved, i. e., (a) that Catherine was not a surviving daughter and that her heirs have now no right, title or interest in the property and no right to any payment of $5,000, and (b) that even if Catherine was a surviving daughter, the interest of her heirs is defeasible upon performance by the plaintiff in error of the condition as to payment remain, as to their merits, practically unanswered by the defendants in error. Their sole defense consists in reliance upon the Kahilina decision, which latter in the first place is not binding either upon us or

upon this Court and in the second place did not decide these two main points or either of them.

It is submitted that the ruling of this court should be as prayed for on pages 116 and 117 of the opening brief of the plaintiff in error.

Dated San Francisco, California, September 30, 1916.

Respectfully submitted,

ANTONIO PERRY,

Attorney for Plaintiff in Error.